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Karun Klasik Sdn Bhd v Tenaga Nasional Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCC)-609–05 OF 2020
AZIZAH NAWAWI, GUNALAN MUNIANDY AND HASHIM HAMZAH JJCA
22 DECEMBER 2022

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Damages — Assessment — Appeal against assessment — Federal Court ordered assessment of damages for wrongful disconnection of electricity — High Court conducted assessment of damages — High Court dismissed claims for loss of products stored in cold room and loss of wages — High Court awarded nominal damages — Whether losses proven — Whether trial judge had misapprehended fact — Whether trial judge failed to appreciate actual nature of claim — Whether trial judge erred in failing to consider evidence which was not challenged during cross-examination — Whether trial judge misdirected herself in relation to principle of evidential burden — Whether appellant entitled to loss of products stored in cold room — Whether appellant entitled to loss of profit — Whether appellant entitled to loss of wages — Whether award of damages ought to be reduced due to appellant's failure to mitigate losses

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The appellant was a company involved in the business of processing and freezing prawns for export. The processed frozen prawns were stored in the appellant's cold rooms which was located at the appellant's factory. The Federal Court by an order dated 4 September 2019 had ordered the High Court to assess damages payable by the respondent ('TNB') to the appellant for wrongful disconnection of electricity supply to the appellant's factory for a period of 12 days ('the FC's order'). In this regard, the appellant had claimed damages more than RM5m which included the claim for loss of products stored in the cold rooms and the loss of wages but the learned High Court judge ('the LJ') had only awarded a nominal sum of RM1,000 as general damages since the appellant failed to prove satisfactorily its losses of stock as pleaded. Aggrieved by the decision, the appellant filed the present appeal. The appellant submitted that the LJ's assessment of damages was erroneous because: (a) the LJ had misapprehended the facts as she had failed to differentiate between raw materials and processed products and consequently, failed to appreciate that what was lost as a result of TNB's wrongful disconnection of electricity supply was the loss of processed products and not loss of raw materials; and (b) the LJ had acted on wrong principles of law in that the LJ had considered unpleaded points such as lack of mitigation, failed to give effect to the evidence which had not been challenged in cross-examination ie, the testimony of DW4 regarding the stock with a value of RM4,884,445.20

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which had been destroyed as a result of the disconnection of the electric supply by TNB, and misdirected herself in relation to the principle of evidential burden as the appellant had led evidence which was unrebutted by TNB on losses suffered.

Held, allowing the appeal and setting aside the LJ's order in part:

(1) The correct approach that the LJ should have adopted was to look at the relevant documents and evidence for proof of the alleged loss and damages as followed: (a) the production cum stock record; (b) the oral testimony of DW4 which was not challenged in cross-examination which established that there were 182,879 cartons of products with a market value of RM4,884,445.20 stored in the cold rooms which had been destroyed; and (c) the independent third party documents to support the appellant's claim of losses. The LJ had plainly erred in law and fact when she held that the appellant was not entitled to loss of profits on the ground that it had not been pleaded. There was a failure by the LJ to judicially appreciate the actual nature of the claim being the market/sale value of the products that perished, the determination of which would reasonably include both cost and loss of profit, despite there being ample evidence before the court, both oral and documentary, which was not contradicted. The court was of the view that the LJ had unreasonably rejected the evidence and decided to merely award nominal damages of RM1,000 (see paras 22, 48 & 52).

(2) The court agreed with TNB that the appellant's claim for loss of wages for a three month period was untenable for being excessive and unreasonable bearing in mind that the disconnection of electricity supply lasted only for 13 days. However, it was plainly wrong for the LJ to have dismissed this head of claim in its entirely without considering a reasonable award for loss of wages for a period of 13 days. In the circumstances, the court set aside the LJ's decision on this head of claim and substituted for it a reasonable award of for a 13-day period, in the sum of RM30,187.31 (see paras 56–57).

(3) The LJ had erred in law and fact in dismissing the main claim of RM4,884,445.20 in toto and instead, awarding merely nominal damages. It was in disregard of the FC's order directing that damages be assessed for losses incurred by the appellant following wrongful disconnection of electricity supply. It was implicit in the order that the appellant had suffered substantial damage to its stock meant for export. The facts and evidence before the court clearly supported the pleaded claim of RM4,844,455.20. However, the court made a deduction of 20% on the ground of the appellant's failure to mitigate its losses, which gave a figure of RM3,907,556 which the court, accordingly, awarded for loss of profits. As for general damages, the court awarded a sum of RM20,000

to the appellant as the court was of the view that it was reasonable and appropriate under the circumstances of the present case (see paras 58 & 60–61).

[Bahasa Malaysia summary

Perayu merupakan sebuah syarikat yang terlibat dalam perniagaan pemprosesan dan pembekuan udang untuk dieksport. Udang sejuk beku yang telah diproses telah disimpan di dalam bilik sejuk beku perayu yang terletak di kilang perayu. Mahkamah Persekutuan melalui perintah bertarikh 4 September 2019 telah memerintahkan Mahkamah Tinggi untuk menilai ganti rugi yang perlu dibayar oleh responden ('TNB') kepada perayu disebabkan oleh pemotongan bekalan elektrik secara salah ke atas kilang perayu untuk tempoh 12 hari ('perintah MP'). Dalam hal ini, perayu telah menuntut ganti rugi lebih daripada RM5 juta termasuk tuntutan kehilangan produk yang disimpan di bilik sejuk beku berkenaan dan tuntutan kehilangan gaji tetapi hakim Mahkamah Tinggi yang bijaksana ('HMT') hanya memberikan jumlah nominal sebanyak RM1,000 sebagai ganti rugi am kerana perayu gagal membuktikan dengan memuaskan kehilangan stoknya seperti yang didakwa. Terkilan dengan keputusan tersebut, perayu memfailkan rayuan semasa. Perayu berhujah bahawa penilaian ganti rugi HMT adalah suatu kekhilafan kerana: (a) HMT telah tersalah memahami fakta kerana beliau gagal membezakan antara bahan mentah dan produk yang diproses dan akibatnya, gagal memahami bahawa apa yang hilang akibat daripada tindakan salah TNB memotong bekalan elektrik adalah kehilangan produk yang diproses dan bukan kehilangan bahan mentah; dan (b) HMT telah bertindak mengikut prinsip undang-undang yang salah kerana HMT telah mempertimbangkan perkara yang tidak diplid seperti kekurangan mitigasi, telah gagal untuk memberi kesan kepada keterangan yang tidak dicabar dalam pemeriksaan balas iaitu, keterangan DW4 mengenai stok yang musnah yang bernilai RM4,884,445.20 akibat pemotongan bekalan elektrik oleh TNB, dan telah tersalah arah berhubung dengan prinsip beban keterangan kerana perayu telah mengemukakan keterangan yang tidak disangkal oleh TNB berkaitan kehilangan yang dialami.

Diputuskan, membenarkan rayuan dan mengenepikan sebahagian perintah HMT:

(1) Pendekatan yang betul yang sepatutnya digunakan oleh HMT adalah dengan melihat dokumen-dokumen dan keterangan yang berkaitan untuk membuktikan dakwaan kehilangan dan kerugian seperti berikut: (a) rekod pengeluaran merangkap stok; (b) keterangan lisan DW4 yang tidak dicabar dalam pemeriksaan balas yang membuktikan terdapat 182,879 karton produk dengan nilai pasaran RM4,884,445.20 yang telah musnah yang disimpan di dalam bilik sejuk beku tersebut; dan (c) dokumen pihak ketiga yang bebas untuk menyokong tuntutan

kehilangan perayu. Hakim Mahkamah Tinggi telah jelas terkhilaf dari segi undang-undang dan fakta apabila beliau berpendapat perayu tidak berhak untuk menerima tuntutan kehilangan keuntungan atas alasan ia tidak diplid. Terdapat kegagalan oleh HMT untuk menilai secara kehakiman sifat sebenar tuntutan tersebut sebagai nilai pasaran/jualan produk yang musnah, di mana penentuan yang munasabah akan merangkumi kedua-dua kos dan kehilangan keuntungan, walaupun terdapat keterangan lisan dan dokumentari yang tidak bercanggah yang mencukupi di hadapan mahkamah. Mahkamah berpendapat bahawa HMT telah menolak keterangan secara tidak munasabah dan memutuskan untuk hanya memberikan ganti rugi nominal sebanyak RM1,000 (lihat perenggan 22, 48 & 52).

(2) Mahkamah bersetuju dengan TNB bahawa tuntutan perayu untuk kehilangan gaji untuk tempoh three bulan adalah tidak boleh dipertahankan kerana keterlaluan dan tidak munasabah dengan mengambil kira bahawa pemotongan bekalan elektrik hanya berlangsung selama 13 hari. Walau bagaimanapun, adalah jelas salah bagi HMT untuk menolak tuntutan ini sepenuhnya tanpa mempertimbangkan award yang munasabah untuk kehilangan gaji untuk tempoh 13 hari. Dalam keadaan tersebut, mahkamah mengenepikan keputusan HMT mengenai tuntutan ini dan menggantikannya dengan award yang munasabah untuk tempoh 13 hari yang berjumlah RM30,187.31 (lihat perenggan 56–57).

(3) Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta dalam menolak tuntutan utama sebanyak RM4,884,445.20 secara keseluruhan dan sebaliknya, memberikan ganti rugi nominal semata-mata. Ia bercanggahan dengan perintah MP yang mengarahkan bahawa ganti rugi dinilai bagi kerugian yang ditanggung oleh perayu berikutan pemotongan bekalan elektrik yang salah. Ianya adalah tersirat dalam perintah tersebut bahawa perayu telah mengalami kerugian yang besar pada stoknya yang ingin dieksport. Fakta dan keterangan di hadapan mahkamah jelas menyokong tuntutan yang diplidkan sebanyak RM4,844,455.20. Bagaimanapun, mahkamah membuat potongan sebanyak 20% atas alasan kegagalan perayu untuk mengurangkan kerugiannya, yang membawa kepada jumlah RM3,907,556 yang sewajarnya mahkamah berikan bagi kehilangan keuntungan. Bagi ganti rugi am, mahkamah memberikan award berjumlah RM20,000 kepada perayu kerana mahkamah berpendapat ia adalah munasabah dan sesuai di bawah keadaan kes ini (lihat perenggan 58 & 60–61).]

Cases referred to

Devan & Asscoc (wholly owned by Devan a/l Narayanan Raman) v TSR Bina Sdn Bhd [2015] 3 MLJ 454, CA (refd)

Good Folio Sdn Bhd lwn Tenaga Nasional Bhd [2018] MLJU 95; [2018] 1 LNS 366, HC (refd)
KPM Khidmat Sdn Bhd v Tev Kim Suie [1994] 2 MLJ 627 (refd)
Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, HC (refd)
Ng Tiou Hong v Collector of Land Revenue, Gombak [1984] 2 MLJ 35, FC (refd)
Pentadbir Tanah Daerah Kota Tinggi v Siti Zakiyah bte Sh Abu Bakar & Ors [2006] 2 MLJ 426, FC (refd)
Shen & Sons Sdn Bhd v Jutawarna Development & Ors [2016] 7 MLJ 183, HC (refd)
Sony Electronics Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229, CA (refd)
The Clyde [1856] Swab, 23, HC (refd)
The United States of America v Shearn Delamore & Co and Drew & Napier & Ors [2007] 8 MLJ 654, HC (refd)
Tiow Weng Theong v Melawangi Sdn Bhd [2018] 6 MLJ 761; [2019] 2 CLJ 655, CA (refd)
Yeah Eh Farn v Alliance Bank (M) Bhd [2014] 3 CLJ 803, HC (refd)

Appeal from: *Tenaga Nasional Berhad v Karun Klasik Sdn Bhd* [2015] MLJU 1119 (High Court, Kuala Lumpur)

Jack Yow Pit Pin (with Kan Hui Ling) (Rahmat Lim & Partners) for the appellant.
Balvinder Singh Kenth (with Gurmesh Kaur) (Kenth Partnership) for the respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] On 6 April 2020, the learned High Court judge ('LJ') in assessing damages payable by the respondent ('TNB') decided to award only a nominal sum of RM1,000 as general damages ('GD') pursuant to a Federal Court ('FC') order dated 4 September 2019. Vide that order, the FC ordered the High Court to assess damages payable by TNB to the appellant for wrongful disconnection of electricity supply to the latter's factory for a 12 day period. The appellant had claimed damages in excess of RM5m caused by TNB through wrongful disconnection as held by the FC. Hence, this appeal.

BRIEF FACTS

[2] The appellant carried on business at a factory located on its premises which processes and freezes prawns mainly for export. The processed frozen prawns were stored in the appellant's cold rooms (located at the appellant's premises) pending export and sale.

[3] On 20 April 2011, based on the respondent's inspection on 16 March 2011, the respondent issued a notice to disconnect the appellant's electricity supply by giving a very short 24 hours' notice on 21 April 2011 at 2.30pm.

[4] The appellant denied tampering with the meter and pleaded with the respondent not to disconnect its electricity and urged TNB to investigate further.

[5] At about 2.30pm on 21 April 2011, the respondent disconnected the electricity supply to the appellant's premises. The electricity supply to the appellant's premises was only reconnected on 3 May 2011. Thus, there was no electricity supply for a period of 13 days.

[6] Before and after the respondent's disconnection on 21 April 2021, express notice was given to the respondent that the respondent's disconnection of electricity will cause the appellant's factory operations to stop and cause the products stored in the appellant's cold room to spoil or rot.

[7] The respondent filed a suit against the appellant for the sum of RM1,579,981.35 being back billing charges due to meter tampering at the appellant's premises.

[8] The appellant in turn counterclaimed for the amount of RM5,371,660 and US$85,000 for loss of business profits allegedly suffered as a result of the disconnection of electricity supply at the appellant's premises for 13 days.

[9] On 16 March 2015, both the respondent's claim and the appellant's counterclaim were dismissed by the High Court.

[10] The appellant appealed to the Court of Appeal against the dismissal of the appellant's counterclaim. The respondent did not appeal against the dismissal of their claim but only cross-appealed against the appellant's appeal.

[11] The Court of Appeal dismissed both the appellant's appeal and the respondent's cross-appeal. However, the appellant was granted leave to appeal to the Federal Court ('FC') on 6 April 2017 and on 4 September 2019, the Federal Court allowed the appellant's appeal on its counterclaim and ordered damages to be assessed by a different High Court judge. The Federal Court found the respondent liable for wrongfully disconnecting the appellant's electricity and ordered the High Court to assess damages payable by the respondent.

[12] As ordered by the Federal Court, the High Court conducted the

assessment of damages ('assessment proceedings'). The appellant's claim for losses as follows:

(a) loss of products stored in the cold rooms (RM4,884,445.20);

(b) settlement sum paid to third party (US$85,000 or its equivalent RM268,268.50);

(c) the expenses rendered futile — wages paid during shutdown due to disconnection of electricity (RM487,694.36); and

(d) general damages ('GD') for injury to reputation and loss of business.

[13] At the end of the assessment proceedings, on 6 April 2020, the LJ judge made the following orders:

(a) no award for special damages;

(b) awarded a nominal sum of RM1,000 as general damages; and

(c) awarded costs of RM8,000 in favour of the respondent against the appellant.

[14] Aggrieved with the said decision the appellant appealed to the Court of Appeal.

OUR DECISION

[15] We would first and foremost look at the reasons why the LJ decided to make a nominal award of a mere RM1,000 notwithstanding the decision by the FC that the appellant had suffered losses and damages to its business due to the 12 day long disconnection of its electricity supply. Essentially, the LJ's finding was that the appellant/plaintiff had failed to prove satisfactorily its losses of stock as pleaded.

[16] The LJ's grounds for her decision have been summarised by the respondent as follows:

(a) the defendant failed to produce the primary/source evidence which should be in its possession, to prove its claim that it had stock valued at RM4,884,445.20 in its cold room on 21 April 2011;

(b) the amount claimed represents the sale price of the stock and not its value or the price at which the defendant purchased the stock. Since the defendant has not pleaded its claim to include 'loss of profits' the claim is unsustainable in law;

(c) loss of profits is also not claimable as special damages as it is contingent upon a concluded sale; and

(d) since RM4,884,445.20 represents the sale price of the stock, it clearly does not represent the 'value' (*nilai*) of the stock and therefore the pleaded claim has not been proven.

[17] In summary, the appellant's submission was that the LJ's assessment of damages was erroneous for these reasons:

(a) having misapprehended the facts as she had failed to differentiate between raw materials and processed products and consequently, failed to appreciate that what was lost as a result of TNB's wrongful disconnection of electricity supply was the loss of processed products and not loss of raw materials; and

(b) had acted on wrong principles of law in that the LJ:

(i) took into consideration unpleaded points such as the lack of mitigation;

(ii) failed to give effect to evidence which had not been challenged in cross-examination; and

(iii) misdirected herself in relation to the principle of evidential burden as the appellant had led evidence which was unrebutted by TNB on losses suffered.

[18] We have noted that the appellant's losses as pleaded are three-fold:

(a) loss of products stored in the cold rooms in the sum of RM4,884,445.20 for these reasons:

(i) a natural consequence of the disconnection of electricity is that the cold rooms would fail to function/operate resulting in the products which were processed, ie, frozen and packed prawns stored therein to spoil and rot. Such products cannot be sold; and

(ii) TNB has actual knowledge that the products stored in the cold rooms would spoil and rot if the electricity supply to the same was disconnected and not re-connected within 24 hours as express notice of this outcome, both oral and in writing, both before and after the disconnection, had been given by the appellant to TNB.

(b) settlement sum paid to a third party ('TP') by reason of having breached its contract of sale to its ('TP's') customers:

(i) the appellant operated a factory on its premises and TNB was supplying electricity to the factory. It is thus reasonably foreseeable that products produced by a factory would be sold and/or supplied to third parties; and

(ii) it would be a natural consequence and also reasonably foreseeable

that if the stored products were destroyed as a result of electricity supply to the cold rooms having been disconnected, the appellant would have no products left to sell and/or to supply to third parties as intended resulting in the appellant breaching its contracts and being liable for damages to third parties.

(c) the expenses rendered futile in the sum of RM487,694.36 because:

(i) TNB had actual knowledge that the appellant's factory would close and not operate if the electricity supply to the same was disconnected as express notice of the same, as referred to above had been given by the appellant to TNB; and

(ii) it is reasonably foreseeable that the appellant would be liable to continue to pay wages to its employees during the closure of the appellant's factory operations despite the closure being due to the disconnection of the appellant's electricity supply. Salaries must continue to be paid to employees even if the factory is shutdown by reason of disconnection of electricity supply by TNB.

(d) GD for injury to reputation and loss of business.

[19] Our attention was brought to that part of the LJ's decision where she had allowed the appellant's claim for this head of damages in the nominal sum of RM1,000 only. Hence, as there was no appeal by TNB on the decision to award GD to the appellant, TNB was bound by this decision that the appellant was entitled to GD. In this appeal, the appellant's ground of appeal is only in respect of the quantum of GD awarded which was said to be manifestly inadequate and wrong in principle.

[20] In respect of the head of damages as per (a) as above, the question for our determination was whether the LJ had erred in her finding as a result of misapprehending the facts as below:

(a) the appellant's business was not buying raw prawns for re-selling but buying prawns to process and freeze them before selling the products. What was stored in the cold rooms and had spoilt as a result of TNB's disconnection of electricity was the products produced by the factory and not the raw prawns that were purchased for the finished products;

(b) it was the production at the factory that was the source of the stocks of the products stored in the cold rooms and to prove the lost stocks, the material documentary evidence was only the production cum stock report; and

(c) what was lost were the products stored in cold rooms and not the raw prawns purchased which means that the documents relating to purchase the raw prawns were not relevant for the purpose of proving the present loss.

[21] We have noted, as correctly bought to our attention by the appellant, that there are significant differences between the raw prawns and the processed products, which were produced through an elaborate process using the original raw prawns to get the finished products which were the stock that perished.

[22] We are in agreement with the appellant's proposition that the correct approach that the LJ should have adopted was to look at the relevant documents and evidence for proof of the alleged loss and damages as follows:

(a) the production cum stock record;

(b) oral testimony of DW4 proving that there were 182,879 cartons of products with a market value of RM4,884,445.20 stored in the cold rooms; and

(c) independent third party documents of Dong Ju and Nishihara to support the appellant's claim of losses.

[23] We have also considered the fact that TNB also did not cross-examine DW4 on his statement that 182,879 cartons worth RM4,884,445.20 had been lost. Such a failure would, in principal, amount to an admission of the unchallenged fact in issue.

[24] We do not propose to enumerate the ample evidence, both direct and contemporaneous, disclosing without doubt the existence of products in the appellant's cold rooms at the material time of the supply disconnection except to highlight certain salient aspects of the evidence.

[25] Amongst others, DW4 testified that after the products have been processed, frozen in boxes and packed in cartons, they were stored in the cold rooms pending shipment to customers on the agreed delivery dates. His testimony was specific that at the material time the quantity of the products stored in the appellant's cold rooms was 182,879 cartons and he had actual sight of the spoilt products some four days after the TNB's disconnection of supply.

[26] DW4 said that as the appellant operated a factory processing and freezing prawns for export, it kept a proper records of products stored in its cold rooms for delivery to its customers.

[27] The appellant's case in gist on this point was that its stock record and DW4's oral testimony corroborate each other to show that there were 182,879 cartons of products stored in the appellant's cold rooms at the time TNB disconnected the appellant's electricity supply. A

[28] It was indisputable that at that time the appellant's factory was in full operation and using electricity supply before the disconnection. As such coupled with the fact that it was actively in production, there must have been storage of its products in the cold rooms which were purpose-built for that purpose. In the circumstances, the cold rooms could not then have conceivably been devoid of products to warrant only a nominal award of damages. B C

[29] The appellant was correct to contend that, contrary to the LJ's finding, there was sufficient evidence of the appellant's finished products having spoilt as a result of the disconnection of supply. It was supported by the evidence that the appellant had to resort to selling the spoilt products as fish feed which was clearly not the nature of the appellant's business. Its business activity was to source for prawns, process and freeze the same for export to customers abroad. It was obvious that mere evidence of the purchase of raw prawns would not go to prove the extent of the appellant's losses as it was the product that underwent an elaborate process at its factory that was lost due to damage. D E

[30] The fact of there having been a substantial quantity of the appellant's products in the cold rooms was supported by its conduct surrounding and following the disconnection of electricity supply. It was in evidence that the appellant repeatedly and desperately informed TNB that its processed prawns in the cold rooms would go to waste if electricity supply was to be disrupted. There were also pleas for the supply to be restored to avoid substantial loss. F

[31] Of significance in respect of DW4's evidence was that his statement that the appellant's products worth almost RM5m had been lost was not challenged in cross-examination. On this point of failure to cross-examine DW4 on facts material to the appellant's counterclaim, our attention was drawn to the off-quoted case of *The United States of America v Shearn Delamore & Co and Drew & Napier & Ors* [2007] 8 MLJ 654 ('Shearn Delamore'), where it was held that: G H

> The party who fails to cross-examine and to take his stand in the witness box surrenders his right to require the court to evaluate the evidence to determine the truth, as the court would have to treat the oral evidence of his opponent as the whole truth. I

[32] We were asked to bear in mind that TNB's pleaded defence as to the quantum of the appellant's claims is only one of bare denial. No facts were pleaded by TNB in support of its defence. Neither did TNB plead mitigation

or remoteness of damage or any other specific defences and/or facts in support of the same.

[33] We, therefore, agree with the appellant's contention that the existence of products in the appellants' cold rooms had become a non-issue and not open to dispute. Hence, it followed that the LJ had wrongly held that no witness testified as to the existence of the said products in the cold rooms in view of DW4's unequivocal testimony.

[34] We have also duly given consideration to the issue of third party ('TP') corroboration of the appellant's documentary evidence relating to the TP's customers to whom the products were meant to be exported. We do not propose to set out in detail the transactions involving the TP, in particular the records of the stocks stored by the appellant for said TPs who had purchased the products in quantities as reflected in the stock record.

[35] Contrary to the position taken by the appellant, the respondent sought to impress upon us that it is trite law that special damages ('SD') must not only be specifically pleaded but also proven on a balance of probabilities (see: *Good Folio Sdn Bhd lwn Tenaga Nasional Bhd* [2018] MLJU 95; [2018] 1 LNS 366).

[36] The thrust of the respondent's contention was that TNB has pleaded this in its defence to the counterclaim. The defendant cannot simply throw its figures at the court. It must satisfactorily discharge the burden of proving that the loss was suffered and the extent of the damages claimed. If the claim is pleaded as special damages, the exact quantum must be proven.

[37] According to the respondent, the LJ had correctly applied the law to the present factual matrix as spelt out in her GOJ and arrived at a conclusion that was not erroneous.

[38] It was common ground that the appellant's primary claim is for the 'value' of the prawns that were allegedly stored in its cold room and had become spoilt purportedly as a result of the disconnection of electricity. The defendant claimed that the stock of prawns was 'valued' at RM4,884,445.20.

[39] The LJ took issue with the documentary evidence relied upon by the appellant to prove its claim and concluded that the evidence was insufficient to discharge the onus of proving that there were processed prawns of that value in the cold room on 21 April 2011.

[40] It was the LJ's basic finding that the appellant (defendant) pursuant to

its counter-claim had failed to prove the 'value' of its stock in the cold room as it relied on a printout called summary of the stock ('the stock summary') for which the data was collated from what is allegedly a detailed record of the stock ('the stock record'). A

[41] Briefly, these were the reasons for her finding as above: B

(a) the data which formed the basis of the stock summary was not explained, eg what were the sources or primary documents;

(b) DW4 was not a competent witness to testify on the stock records;

(c) DW4 could not provide any explanation for not producing material documents (purchase orders, delivery notes, invoices, etc) for the processed prawns then stored in the cold rooms; C

(d) the stock summary was not reliable as it was not a detailed stock record regularly kept in the ordinary course of business; D

(e) value of the stock was not proved as proforma invoices and stock bookings by customers were not produced;

(f) no evidence tendered on how the particulars of the detailed stock record were derived; E

(g) veracity of the documents, though Part B, was not proved; and

(h) the value of the prawns being claimed included the appellant's profit which was contrary to its pleaded case which did not claim for loss of profits but only for value of its stock. F

[42] By reason of the above factors, the LJ concluded that the appellant had not proven that there were prawns stored in the cold rooms at the material time and thus, the issue of damages does not arise. It was the respondent's contention that there was no error of law or fact in the LJ's decision by reference to the following authorities: G

(a) *Sony Electronics Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229;

(b) *KPM Khidmat Sdn Bhd v Tev Kim Suie* [1994] 2 MLJ 627; H

(c) *Tiow Weng Theong v Melawangi Sdn Bhd* [2018] 6 MLJ 761; [2019] 2 CLJ 655;

(d) *Shen & Sons Sdn Bhd v Jutawarna Development & Ors* [2016] 7 MLJ 183; and I

(e) *Yeah Eh Farn v Alliance Bank (M) Bhd* [2014] 3 CLJ 803.

[43] With respect, having perused the findings of the LJ and carefully considered the reasons for the findings thereof, we are unable to concur with

A the conclusion reached by the LJ that the evidence adduced by the appellant in its entirety fell far short of proving the loss and damages as pleaded despite the FC decision that we have adverted to that made it explicit that the appellant had suffered loss and damage due to TNB's action.

B **[44]** In our considered view, the appellant rightly contended that the correct approach to assessment that the LJ should have adopted was to apply the principle that the measure of damages should be as defined in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at p 38 as 'that sum of money which will put the party who has been injured, or who has suffered, in the same C position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation'.

[45] Following the FC decision, the liability of TNB for the wrongful D disconnection of electricity supply to the appellant's factory was a non-issue. Likewise, that the appellant had suffered damages that required assessment as a result of that incident. We are in concurrence with the appellant that the measure of damages should be the profit that the appellant's business could have obtained from a sale of the products or the market value thereof. The E entitlement should be for the appellant to be put into the position that it would have been in had the products in the cold rooms not spoiled as a result of TNB's disconnection of the electricity supply (see *The Clyde* [1856] Swab, 23 at p 24).

[46] As regards what 'market value' means, it has been defined by the FC as F 'the price which a willing vendor might reasonably expect to obtain from a willing purchaser' (see *Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35 at p 37 and *Pentadbir Tanah Daerah Kota Tinggi v Siti Zakiyah bte Sh Abu Bakar & Ors* [2006] 2 MLJ 426 at p 436).

G **[47]** We are satisfied, contrary to the findings of the LJ, that the appellant had produced sufficient and reliable documentary evidence to show that the market value of the products and the price at which its customers were willing to pay to acquire the products. Amongst others, the relevant purchase orders and proforma invoices were tendered attesting to the market value of the H products lost during the incident. A summary and computation of the loss based on the stock record and prevailing market value ought not to have been disregarded by the LJ as proof of the appellant's loss.

[48] Importantly, DW4 had also testified that stock with a value of I RM4,884,445.20 has been destroyed as a result of TNB disconnecting the electricity supply and only a sum of RM10,479.36 was recovered by selling the spoilt stock as fish feed. It was crucial that DW4's testimony as above and on other material aspects was not challenged or contradicted in cross-examination.

[49] The failure of the LJ to appreciate that oral evidence that is not challenged or rebutted must be deemed to have been accepted as the truth was wrong in principle by reference to the authorities that we have adverted to. There was also the omission by TNB to proffer any rebuttal evidence on the then current market value of the products lost due to spoilage.

[50] As we have emphasised earlier, the misapprehension of the LJ and the respondent stems from not focussing on the market value of the said products but on the cost of purchasing raw prawns which is, to our minds, was an irrelevant consideration and an erroneous approach. In the premises, we held that both TNB and the LJ had misapprehended the facts and were under a misconception when they failed to appreciate that the appellant was not purchasing raw prawns for re-sale. In effect, what was lost was not merely raw prawns but processed prawns (products).

[51] We concur with the appellant's contention that on the unrebutted evidence that the loss was processed products, the cost of which cannot be determined by the cost of the raw prawns as it would include the several necessary costs incurred in the production process, such as electricity, labour and the like. It was obvious to us that the determination of the loss cannot be confined to merely the value of raw prawns plus profits.

[52] We would conclude on this main aspect of the pleaded claim that the LJ had plainly erred in law and fact when she held that the appellant was not entitled to loss of profits on the ground that it had not been pleaded. There was a failure by the LJ to judicially appreciate the actual nature of the claim being the market/sale value of the products that perished the determination of which would reasonably include both cost and loss of profit. Despite there being ample evidence before the court, both oral and documentary, which was not contradicted. In our view, the LJ had unreasonably rejected the evidence and decided to merely award nominal damages of RM1,000.

[53] We would now touch briefly on the appellant's next head of claim: loss of wages that had to be paid to its employees during the period of closure. In gist, this head of claim as submitted by the appellant was as follows:

(a) TNB had given express notice that the appellant's factory would close if TNB disconnected the electricity supply for 12 days. Following therefrom, the loss of wages in the sum of RM487,684.36 which have to be paid during this period of closure is a foreseeable consequence of such closure and is not too remote. Expenses rendered futile as a result of TNB's disconnection of the electricity supply can be recovered as damages.

[54] A summary of the LJ's reasons for holding that the defendant's claim for loss of wages is untenable is that:

(a) the defendant's factory was not in operation for three months and there is no reason for the defendant to have retained 40 workers as their service would not be fully utilised;

(b) to retain 40 workers and for a period of three months cannot be said to be reasonable;

(c) the reason for retaining that number of workers was speculative. There was no evidence to support DW4's testimony that the defendant was trying to woo their customers to purchase the prawns; and

(d) this head of damages is too remote and is not a reasonable consequence of the disconnection of electricity supply by TNB for a mere 13 days.

[55] In support of the LJ's above findings, TNB contended that after electricity had been reconnected, there was no impediment for the defendant to recommence operations. The defendant chose to end its business operations on its own volition. This amounts to a break in the chain of causation and TNB cannot be held liable for any damage which may flow from this commercial decision taken by the defendant (see: *Devan & Asscoc (wholly owned by Devan a/l Narayanan Raman) v TSR Bina Sdn Bhd* [2015] 3 MLJ 454).

[56] We have duly considered the LJ's reason for her decision and the contention of the respondent as above. We are in agreement with the respondent that the claim as pleaded for a three month period is untenable for being excessive and unreasonable bearing in mind that the disconnection of electricity supply lasted only for 13 days. However, in our view, it was plainly wrong for the LJ to have dismissed this head of claim in its entirely without considering a reasonable award for loss of wages for a period of 13 days.

[57] In the circumstances, we set aside the LJ's decision on this head of claim and substituted for it a reasonable award of for a 13 day period, in the sum of RM30,187.31.

CONCLUSION

[58] In our judgment, there are merits in this appeal that warrant appellate intervention. In essence, the LJ had erred in law and fact in dismissing the main claim of RM4,884,445.20 in toto and instead, awarding merely nominal damages. It was in disregard of the FC order directing that damages be assessed for losses incurred by the appellant following wrongful disconnection of electricity supply. It was implicit in the order that the appellant had suffered substantial damage to its stock meant for export.

[59] We therefore, allowed the appeal and set aside the decision and orders of the LJ except for the order whereby the claim for US$85,000 paid to a customer, Dong Ju Trade Co was dismissed. We affirmed the decision in respect of this head of claim based on the grounds for dismissal as spelt out by the LJ.

[60] The facts and evidence before the court clearly supported the pleaded claim of RM4,844,455.20. However, we made a deduction of 20% on the ground of the appellant's failure to mitigate its losses, which gave a figure of RM3,907,556 which we, accordingly, awarded for loss of profits.

[61] As for general damages, we awarded a sum of RM20,000 to the appellant as we were of the considered view that it was reasonable and appropriate under the circumstances of the instant case.

Appeal allowed and LJ's order set aside in part.

Reported by Dzulqarnain Ab Fatar